

May 6, 2005

VIA FACSIMILE AND U.S. MAIL

Wendy Melk, Esq.
Jackson Lewis, LLP
58 S. Service Road
Suite 410
Melville, NY 11747

Re: Schmidt v. AIP

Dear Wendy:

I write with respect to your letter of May 2, 2005, as well as your recent document production and responses to Plaintiff's First Set of Requests for the Production of Documents. As a preliminary matter, I note that our review of your document production is ongoing and any additional issues regarding the nature of your production will be communicated promptly.

As stated in my letter of April 19, 2005, and during our telephone conference of April 18, 2005, we too remain interested in mediation. However, it seems that we both reiterate our interest in mediation without actually moving any closer to mediation. We proposed Ms. Linda Singer as a mediator and you were amenable to her, however, she was not available at that time until June. We both preferred mediation prior to that time. In my April 19, 2005, letter I noted your intention as expressed during the telephone conference to propose additional potential mediators. I have not heard from you regarding any proposed mediators, but remain interested in hearing from you regarding same. Thus, although we are willing to discuss mediation dates as requested in your letter, I feel that it would be helpful to agree on a mediator and consider his or her availability when scheduling proposed mediation dates.

I also note your statement that we "will not agree to stay discovery pending mediation." To be clear, I wrote on April 19, 2005, that although we were presently not inclined to stay discovery pending mediation, we might be willing to revisit this issue. However, at present we only have continued expressions of interest to mediate, and with a June 27, 2005 discovery cut off we have no option but to push forward with discovery.

On a related note, you may recall that when we first began discussing mediation you stated that it would be helpful to assess how serious we were about mediation if we provided some ballpark information about what our settlement demand might be. I had suggested that it would be helpful for both parties to engage in this process. I have communicated to you some weeks ago what ballpark terms might be suitable for a satisfactory settlement from Mr. Schmidt's point of view. I remain interested in hearing from you regarding what settlement terms would be suitable from your client's point of view.

With respect to the scheduling of depositions, I do not share your opinion that you somehow enjoy some priority in deposing Mr. Schmidt before any depositions of Defendant's employees may be had and know of no authority for that position. We will, of course, provide you with Plaintiff's document production in advance of his deposition. We will respond to Defendant's Document Requests and Interrogatories and produce Plaintiff's documents early next week as requested.

Finally, we have some serious concerns regarding your responses to Plaintiff's Document Requests and production. I note that AIP asserts a host of unfounded objections in its responses and has not produced documents that are requested and relevant or likely to lead to the discovery of admissible evidence. I detail the problems with your responses and document production below.

GENERAL OBJECTIONS

General Objection (b): AIP states that it "objects to each request to the extent it does not identify the time period in question, is ambiguous as to time frame or refers to a time period unrelated to Plaintiff's Complaint." Our document requests, however, state "[u]nless otherwise limited in individual requests, this Document Request shall be construed to seek all documents created or edited during the period January 1, 1990 to present" Thus, our Requests are absolutely clear as to time frame and we do not believe that any such objection is well founded. Please inform as to whether AIP has actually withheld any documents based on this objection, and whether it intends to continue to do so.

General Objection (g): AIP objects on the ground that any request seeks "information that is confidential, a trade secret, subject to employee confidentiality rights or otherwise proprietary in nature, the disclosure of which would or could harm defendant." As you are well aware, the Federal Rules do not permit withholding discoverable information based on confidentiality or because production would or could harm the Defendant. If documents were shielded from discovery because they may harm a litigant, one could avoid producing any documents detrimental to their case. The rules simply do not contemplate this. Moreover, we doubt that AIP maintains many, if any, trade secrets or proprietary material. Please inform as to whether AIP has actually withheld any documents based on this objection and whether it intends to continue to do so. We will forward a proposed confidentiality agreement so that any documents withheld on confidentiality or trade secret grounds can be produced.

**SPECIFIC RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS
AND DEFENDANT'S PRODUCTION**

Request No. 1: Conspicuously absent from AIP's production are any documents relating to the actual decision to terminate Mr. Schmidt. I note that AIP has produced at least some documents leading up to Plaintiff's termination, as well as post-termination. But no documents have been produced regarding his actual termination. Nor does it appear that AIP has produced the Human Relations file for Mr. Schmidt or any HR documents relating to his termination. Obviously, AIP's reasons for termination, the decision process and any documents relating thereto, are within the scope of the Request and directly relevant to the claims at issue. I note AIP document bearing the bates identification label D01583. This document delineates the specific process by which AIP employees are to be terminated. Included in this process is mandatory consultation with Human Resources and "adequate documentation." We have received none of this documentation. The document also refers to "Termination & Exit Interview forms following policy #309.01." Similarly, we have not received these forms or the policy referenced. Please produce these documents as soon as possible. Please inform us as to whether AIP is withholding such documents, the grounds for doing so and whether it intends to continue to withhold responsive documents. Alternatively, please inform us if these documents don't exist or if the termination procedure set forth in D01583 was not followed.

Request No. 4: AIP objects to the production of documents – relating to "evaluations and/or the job performance, quality of work, work place activities, compensation, work requirements and any disciplinary actions proposed, contemplated and/or undertaken for the following individuals: Bertram M. Schwarzschild, Jean Kumagai, Toni Feder and Paul Elliott" – on the grounds that, among other things, the Request seeks information that is confidential and related to individuals not a party to this litigation. Consequently, AIP has refused to produce any documents pursuant to this Request. Confidentiality, however, does not shield AIP from its production obligations under the Federal Rules. Nor does the fact that the documents sought relate to individuals who are not parties to this litigation. The liberal discovery rules permit the discovery of any information that is relevant or likely to lead to the discovery of admissible evidence. Workplace performance and the conduct of Mr. Schmidt and his peers is detailed with specificity in Plaintiff's complaint, are therefore central to the claims at issue, and documents responsive to this Request must be produced.

Request No. 6: AIP objects to this Request seeking documents relating to diversity, equal opportunity or affirmative action training on the grounds that, among other things, it "seeks confidential and sensitive business information." As noted above, confidentiality and sensitivity of information are not valid objections sanctioned by the rules. AIP further objects "on the grounds of the self-evaluative/self-critical privilege." Our research reveals that you cannot rely on this purported privilege. Please inform as to whether any documents have actually been withheld on the basis of confidentiality, sensitivity or pursuant to this purported privilege. If you have in fact withheld any documents on these grounds, please inform as to whether AIP intends to continue to withhold these documents.

Request No. 7: AIP refuses to produce any documents relating to this Request on the ground that, among other things, it seeks confidential and sensitive business information. As discussed, this is an invalid objection. AIP also objects on the ground that the Request seeks information not “relevant to Plaintiff’s claims.” As you are aware, the Federal Rules permit “discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . [or] reasonably calculated to lead to the discovery of admissible evidence.” The discovery sought here is clearly relevant to, and calculated to lead to admissible evidence relating to, both Plaintiff’s claims as well as defenses that we anticipate AIP is likely to assert. While he was at AIP, Plaintiff asserted that AIP was deficient in matters relating to affirmative action and equal employment opportunities and practices. Plaintiff also asserts these facts in his Complaint. The accuracy of these charges is directly related to the equal employment concerns that Plaintiff repeatedly raised and for which we believe he was unlawfully terminated. Moreover, we anticipate that AIP is likely to assert that AIP was compliant with equal employment requirements and that Plaintiff’s actions in raising equal employment concerns were unfounded. The documents sought in this Request go directly to the whether AIP was in fact compliant with equal employment requirements and the facts underlying Mr. Schmidt’s concerns. As such, the Request seeks information relevant to both Plaintiff’s claims and AIP’s anticipated defense(s). Finally, AIP refuses to produce documents pursuant to the “self-evaluative/self-critical privilege.” As stated above, this is an improper objection. Please inform as to whether AIP intends to continue to refuse to produce any documents relating to this Request.

Request No. 8: AIP objects to this Request on the ground that it seeks confidential and sensitive business information. As discussed, this is not a valid objection. AIP further objects on the ground that the Request seeks information that is “neither pertinent or relevant to Plaintiff’s claims” and “neither relevant nor material” to his claims. Again, relevance and materiality are not the standard under Rule 26. Furthermore, the information sought is relevant to Plaintiff’s claims and is calculated to lead to the discovery of admissible evidence. By way of example, the qualifications for persons in Plaintiff’s job position and whether Plaintiff satisfied those requirements are obviously relevant to issues relating to Plaintiff’s termination – the central issue of this case. Please inform as to whether AIP has withheld any documents based on any of the foregoing and, if it has, whether it intends to continue to withhold documents.

Request No. 9: For the reasons stated in relation to Request No. 7 above, the objections asserted here are inappropriate. Please inform as to whether AIP has withheld any documents on the grounds of “pertinence” or “relevance” or pursuant to the purported privilege.

Request No. 11: It is not clear from a review of AIP’s document production that all employee handbooks and manuals in effect for the relevant time period have been produced. To the extent that they have not all been produced, or that they have not been produced in their entirety, please do so.

Request No. 14: AIP objects to this Request on the grounds of the self-evaluative/self-critical privilege. As discussed above, AIP may not rely upon this purported privilege. Please inform as to whether AIP has withheld any documents pursuant to this objection and, if so, whether it intends to continue to withhold documents. AIP also objects on the ground that it is uncertain

what information Plaintiff seeks in the Request. By this Request, Plaintiff seeks any and all documents relating to AIP's recruitment of minority and/or women employees. The Request is not limited to seeking information relating to whether AIP actually implemented a policy or practice to recruit minorities and/or women. By way of example, AIP would be required to produce information relating to its decision making process to recruit minority and/or women employees, its decision to not ultimately recruit said employees and/or information relating to AIP's actual practices to recruit said employees if, in fact, it did so. Although we believe the Request and this clarification to be abundantly clear, we would be happy to clarify this Request further if necessary.

Request No. 16: AIP objects to this Request on the ground that it "seeks confidential information regarding individuals who are not parties to the instant action." As discussed, the Federal Rules do not contemplate such an objection and AIP cannot withhold documents based thereon. Please inform as to whether AIP has withheld documents based on the objections raised and, if it has, whether it intends to continue to withhold documents.

Request No. 18: AIP objects to this Request on the ground that it seeks information that is protected by the attorney-client or work product privilege. AIP goes on to object on the ground that the Request seeks documents that are publicly available. Of course, any privilege would extinguish once the documents were transmitted to the public and privilege could not be asserted with respect to these documents. Moreover, AIP is not relieved of its obligation to produce documents in its possession because the Plaintiff could theoretically obtain some of the information elsewhere. As such, please inform as to whether AIP has actually withheld documents based on its asserted objections and, if it has, whether it intends to continue to withhold documents.

Request No. 24: As stated, AIP is not permitted to withhold documents on the grounds that the Request seeks information that is confidential or sensitive or that relates to individuals who are not parties to the litigation. Furthermore, AIP cannot withhold documents based on the purported self-critical/self-evaluative privilege. Please inform as to whether AIP has actually withheld documents based on its asserted objections and, if it has, whether it intends to continue to withhold documents.

Request No. 25: AIP refuses to produce any documents pursuant to this Request on the grounds of confidentiality and sensitivity. As stated, confidentiality or sensitivity of information is not a valid ground on which to withhold documents. Please inform as to whether AIP intends to continue to withhold documents.

We reserve the right to further object to AIP's responses and production deficiencies once we have had an opportunity to further review Defendant's documents.

Although we remain anxious to keep the pace of discovery moving along, we will not permit a deposition of Mr. Schmidt until we have received a full production of Defendant's documents. We are confident that we are entitled to a host of documents that you have failed to produce and have the right to consider these documents during our deposition preparation. Thus,

although we are amenable to discussing new dates for Mr. Schmidt's deposition, the new dates will have to be contingent on AIP remedying the significant production gaps as outlined above.

Finally, I suggest that we schedule a Rule 37 telephone conference to discuss the above pleading and production issues. Given the tight discovery schedule, I recommend that we confer early next week. To get the ball rolling, I propose Tuesday, May 10, 2005, at 2 p.m. EST. Please let me know if there is a more convenient time that you would prefer.

Respectfully,



Erik T. Koons